

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

VICTOR E. GOMEZ,
Plaintiff,

v.

CRAIG ESTEY, et al.,
Defendants.

Case No. 2:21-cv-01105-RFB-EJY

REPORT AND RECOMMENDATION

Re: ECF No. 1.

Presently before the Court is Plaintiff Victor Gomez's Application to Proceed *In Forma Pauperis* (ECF No. 1). Attached to Plaintiff's *in forma pauperis* application is a Complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1-1).

I. IN FORMA PAUPERIS APPLICATION

A complete inmate application to proceed in forma pauperis includes a financial acknowledgment signed by the inmate showing an inability to prepay fees and costs or give security for them, a copy of the inmate's trust account statement for the six months preceding the action, and a financial certificate signed by a prison or jail official authenticating the account statements. 28 U.S.C. § 1915(a). Plaintiff submitted these three documents with his application. ECF No. 1. Therefore, the Court grants Plaintiff's request to proceed *in forma pauperis*.

II. SCREENING THE COMPLAINT

Upon granting a request to proceed in forma pauperis, a court must screen the complaint under 28 U.S.C. § 1915(e)(2). In screening the complaint, a court must identify cognizable claims and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Therefore, to survive § 1915(e)(2) review, a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v.*

1 *Iqbal*, 556 U.S. 662, 678 (2009). The Court liberally construes *pro se* complaints and may only
 2 dismiss them “if it appears beyond doubt that the plaintiff can prove no set of facts in support of his
 3 claim which would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014)
 4 (internal citation omitted).

5 When considering whether the complaint is sufficient to state a claim, all allegations of
 6 material fact are taken as true and construed in the light most favorable to the plaintiff. *Wyer Summit*
 7 *P’ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Although
 8 the standard under Federal Rule of Civil Procedure 12(b)(6) does not require detailed factual
 9 allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v.*
 10 *Twombly*, 550 U.S. 544, 555 (2007). Recitation of the elements of a cause of action alone is
 11 insufficient. *Id.* Unless it is clear the complaint’s deficiencies cannot be cured through amendment,
 12 a *pro se* plaintiff should be given leave to amend the complaint with notice regarding the complaint’s
 13 deficiencies. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

14 **III. DISCUSSION**

15 Plaintiff’s Complaint alleges violations of his “right to privacy” against Dotty’s Casino
 16 employees Craig Estey, Jason Scarale, and Drew Albers (the “Dotty’s Defendants”), and his “right
 17 to liberty” against Las Vegas Metropolitan Police Officers identified as Officer B. Reed and Officer
 18 Knudsod (the “Metro Defendants”). ECF No. 1-1 at 2-3. Plaintiff alleges that on December 11,
 19 2019, following a robbery at Dotty’s, security guards Scarale and Albers believed Plaintiff was the
 20 culprit (which Plaintiff denies), attached a GPS tracker to his car, and followed him to Big Horn
 21 Casino. *Id.* at 4. There, Scarale and Albers, “with the help of the police,” detained Plaintiff. *Id.*
 22 Albers removed the GPS tracker from Plaintiff’s car in front of the police, but the police did not “log
 23 their viewing of the incident nor did [they] take the GPS into evidence.” *Id.* The police then searched
 24 Plaintiff’s car, without a warrant or consent, found “nothing they were searching for,” and arrested
 25 Plaintiff without probable cause. *Id.* at 5. Plaintiff seeks \$150 per day for every day he has been
 26 held in custody, \$5,000,000 for pain and suffering, \$10,000,000 in punitive damages, “replacement
 27 of all property lost,” and an “order barring Dotty’s security from ‘bugging’ cars with ‘GPS.’” *Id.* at
 28 8.

1 Plaintiff does not indicate whether he was charged or convicted for the robbery stemming
 2 from the search and arrest he discusses in his Complaint. However, a search of Clark County
 3 Detention Center’s Inmate Directory and cases before the Eighth Judicial District Court show that
 4 Plaintiff pleaded guilty to felony burglary stemming from his December 11, 2019 arrest, and will be
 5 sentenced on August 18, 2021.¹

6 Plaintiff’s claims are *Heck*-barred. *Heck v. Humphrey* holds that when a damages claim
 7 necessarily implies the invalidity of a plaintiff’s conviction or sentence, the claim is not cognizable
 8 under 42 U.S.C. § 1983. 512 U.S. 477, 483 (1994). A plaintiff seeking monetary damages for an
 9 allegedly unconstitutional conviction or sentence “must prove that the conviction or sentence has
 10 been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal
 11 authorized to make such determination, or called into question by a federal court’s issuance of a writ
 12 of habeas corpus, 28 U.S.C. § 2254.” *Id.* at 486-87. Therefore, the primary question in this case is
 13 whether a judgment in favor of Plaintiff would necessarily implicate the validity of his conviction
 14 and sentence. *Id.* at 486. If so, “the complaint must be dismissed unless [Plaintiff] can demonstrate
 15 that the conviction or sentence has already been invalidated.” *Id.*

16 The Court liberally construes Plaintiff’s “right to privacy” and “right to liberty” claims as
 17 claims for unlawful search, seizure, and arrest under the Fourth Amendment to the U.S. Constitution.
 18 The series of events detailed in Plaintiff’s Complaint are the same events that led to his conviction
 19 (via guilty plea) for felony burglary. Plaintiff’s Complaint clearly seeks to collaterally attack his
 20 conviction, which has not been overturned or otherwise invalidated. Plaintiff’s § 1983 claim is
 21 therefore barred by the rule in *Heck* because a finding in favor of Plaintiff—that he was unlawfully
 22 searched and arrested without probable cause—would necessarily imply his conviction or sentence
 23 was legally invalid. *See Szajer v. City of Los Angeles*, 632 F.3d 607, 6011 (9th Cir. 2011)
 24 (concluding that the plaintiff’s claim of an unlawful search was not cognizable because a finding

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 26 ¹ State inmate records and court proceedings are publicly available at clarkcountycourts.us and
 27 clarkcountynv.gov. The Court takes judicial notice of inmate records and state court proceedings. Fed. R. Evid. 201(b);
 28 *White v. Martel*, 601 F.3d 882, 885 (9th Cir. 2010); *Harris v. City of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (“We
 may take judicial notice of undisputed matters of public record ... including documents on file in federal or state courts”);
United States v. Basher, 629 F.3d 1161, 1165 n.2 (9th Cir. 2011) (courts may take judicial notice of information on
 government inmate locator websites).

that there was no probable cause for the search would necessarily imply the invalidity of plaintiff's conviction for felony possession of a firearm); *Whitaker v. Garcetti*, 486 F.3d 572, 584 (9th Cir. 2007) (finding that plaintiff's challenge to illegally obtained wiretap warrants was barred by *Heck*); *Anderson v. Valenzuela*, Case No. 17-cv-02070-APG-NJK, 2018 WL 3433296, at *2 (D. Nev. June 14, 2018) (finding an unlawful arrest claim barred by *Heck*), *report and recommendation adopted*, 2018 WL 3429656 (D. Nev. July 16, 2018).

If Plaintiff wishes to pursue claims challenging the search and arrest that led to his conviction, he may only do so through a petition for habeas corpus under 28 U.S.C. § 2254.

IV. RECOMMENDATION

IT IS HEREBY RECOMMENDED that Plaintiff's Complaint (ECF No. 1-1) be dismissed without prejudice as barred by *Heck v. Humphrey*.

IT IS FURTHER RECOMMENDED that the Clerk of Court send Plaintiff a copy of instructions pertaining to filing a habeas corpus petition so that, if he so chooses, Plaintiff may commence a new claim under 28 U.S.C. § 2254.

Dated this 4th day of August, 2021.


 ELAYNA J. YOUCHAK
 UNITED STATES MAGISTRATE JUDGE

NOTICE

Pursuant to Local Rule IB 3-2 any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court within (14) days after service of this Notice. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985), *reh'g denied*, 474 U.S. 1111 (1986). The Ninth Circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).